IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

KEITH CAMPBELL AND KATHY CAMPBELL, HUSBAND AND WIFE,
Plaintiffs/Appellants,

v.

FLORENCE GARDENS MOBILE HOME ASSOCIATION,
AN ARIZONA NON-PROFIT CORPORATION,
Defendant/Appellee.

No. 2 CA-CV 2013-0031
Filed March 7, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Pinal County
No. S1100CV201200351
The Honorable Robert Carter Olson, Judge

VACATED AND REMANDED

COUNSEL

The Law Offices of J. Roger Wood, PLLC, Tempe
By J. Roger Wood
Counsel for Plaintiffs/Appellants

Shaw & Lines, LLC, Phoenix
By Augustus H. Shaw IV
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

K E L L Y, Presiding Judge:

¶1 Keith and Kathy Campbell appeal from the trial court's order denying their application for attorney fees in their action against Florence Gardens Mobile Home Association ("the Association"). The court found there was no prevailing party in the Campbells' action seeking enforcement by the Association of its recorded Covenants, Conditions, and Restrictions because the parties settled the matter before trial. For the reasons set forth below, we vacate the court's determination that there was no prevailing party and remand.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. *See Lewis v. Pleasant Country, Ltd.*, 173 Ariz. 186, 188, 840 P.2d 1051, 1053 (App. 1992). The Campbells own real property subject to the Association's recorded Declaration of Covenants, Conditions, and Restrictions ("CC&Rs"). In December 2011, Keith Campbell nominated himself to be placed on the ballot for a position on the Association's board of directors. In January and February 2012, Campbell sent the Association two letters regarding his concerns over election procedures he believed conflicted with Arizona law and the community's governing documents, including the lack of observers for absentee vote counting and the inability of the Casita Hermosa Owners Association Members—a sub-association—to run for board positions. According to Campbell, the Association did not respond to the letters, despite his notice in the second letter that he would pursue "all . . . legal remedies if it bec[ame] necessary."

¶3 The Campbells filed suit against the Association on February 10, 2012, four days before the scheduled board election.

Their complaint alleged the Association had breached its CC&Rs and other governing documents and had violated Arizona statutes regarding community association meetings and elections. The Campbells requested a temporary restraining order suspending the February 14 annual meeting and election, a permanent injunction regarding meeting and election procedures, damages, and their attorney fees and costs. The trial court issued the temporary restraining order, suspending the February meeting and election and enjoining the Association and its agents from engaging in acts related to the election or meeting, pending a hearing.

¶4 In June, the court stayed the litigation to give the parties "an opportunity . . . to attempt to resolve the[] issues on their own without the need for further litigation[,] and if there is a need for litigation to try to narrow those issues as substantially as possible." Although the parties asked for a ruling on any pending issues[1] to "make[] the attorney fees issue clean," the court declined to do so.

¶5 In September, the parties stipulated to certain annual meeting and board election procedures, including: absentee ballot procedures; transparency in tabulating ballots; permitting sub-association members to be nominated, run, and vote in board elections; board nomination procedures; and implementation of election procedures. They declared the stipulation was not to "prejudice . . . any substantial procedural claim that any party may have . . . pending[,] . . . including unsettled issues of prevailing party and attorney[] fees and costs" and requested the trial court hold a hearing to address "all outstanding issues regarding the case."

¶6 The trial court entered the stipulation at a hearing in October 2012, concluding there were "no remaining claims or defenses [to be considered] other than who [was] the prevailing party and fees and costs." Relying on § 12-341.01 and a provision in the CC&Rs granting attorney fees to a party who is deemed

[1]The Association had moved to disqualify counsel for the Campbells, albeit unsuccessfully, to dismiss the action for lack of standing, and for a more definite statement of facts and issues in their complaint.

successful in the litigation, both parties moved for attorney fees and costs and submitted affidavits in support of their respective requests. After considering both parties' applications, the court declined to award fees or costs to either party, stating it had "made no findings, issued no judgments, and made no decisions on the merits" such that no party qualified as having prevailed.

¶7 The Campbells filed a motion for reconsideration, asking the court to "make a 'prevailing party' determination and . . . award legal fees accordingly." The court denied the motion, and the Campbells appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A).[2]

Discussion

¶8 The Campbells argue the trial court lacked a reasonable basis for declining to declare a successful party and award attorney fees; further, they maintain that because they "received all relief asked for in the complaint," they should be declared the successful party and awarded their reasonable attorney fees and costs. We review a court's interpretation of contractual fee provisions "de novo as an issue of law." *Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, ¶ 31, 272 P.3d 355, 364 (App. 2012). We will uphold the court's determination that there is no "prevailing party" if it had a reasonable basis for doing so. *See id.*; *Maleki v. Desert Palms Prof'l Props., L.L.C.*, 222 Ariz. 327, ¶¶ 34-35, 214 P.3d 415, 422 (App. 2009) (examining attorney fees award pursuant to A.R.S. § 12-341.01).

Attorney Fees

¶9 A party may not recover attorney fees unless they are provided for by statute or by agreement between the parties. *Taylor*

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[2]Because the minute entry containing the trial court's ruling, dated December 31, 2012, was an unsigned order that did not constitute an appealable final judgment for purposes of § 12-2101 or Rule 58, Ariz. R. Civ. App. P., we dismissed the appeal. *See Pima Cnty. v. Testin*, 173 Ariz. 117, 118, 840 P.2d 293, 294 (App. 1992). The appeal was reinstated after the court signed an order affirming its December minute entry.

v. S. Pac. Transp. Co., 130 Ariz. 516, 523, 637 P.2d 726, 733 (1981). Restrictive covenants "'constitute a contract between the subdivision's property owners as a whole and individual lot owners,'" *McDowell Mountain Ranch Cmty. Ass'n, Inc. v. Simons*, 216 Ariz. 266, ¶ 14, 165 P.3d 667, 670 (App. 2007), *quoting Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, ¶ 5, 2 P.3d 1276, 1279 (App. 2000), and assenting to their provisions binds a homeowner as effectively as if he had executed the instrument containing them, *see Heritage Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330, 333, 565 P.2d 207, 210 (App. 1977).

¶10 The Campbells' opening brief correctly notes that "A.R.S. § 12-341.01 governs the recovery of attorney fees in an action arising out of a contract." But the award of fees here is governed by the contractual provision in the Association's CC&Rs that a person who employs an attorney to enforce compliance with the CC&Rs is entitled to attorney fees. *See* § 12-341.01(A) ("This section shall not be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney fees."); *Geller v. Lesk*, 230 Ariz. 624, ¶ 9, 285 P.3d 972, 975 (App. 2012) (when parties contractually provide for attorney fees, contractual provision and not statute governs award); *Sweis v. Chatwin*, 120 Ariz. 249, 252, 585 P.2d 269, 272 (App. 1978) ("[I]t is our opinion that [§ 12-341.01] is inapplicable to the litigation here involved, inasmuch as the parties have provided in their contract the conditions under which attorney's fees may be recovered."); *but see Pioneer Roofing Co. v. Mardian Constr. Co.*, 152 Ariz. 455, 471, 733 P.2d 652, 668 (App. 1986) (when unilateral contract provision provides attorney fees to only one party, § 12-341.01 applies to other party's right to award of attorney fees). Because the contractual provision governs the award of attorney fees here, we do not address the trial court's decision pursuant to § 12-341.01.

¶11 "Unlike fees awarded under A.R.S. § 12-341.01(A), the court lacks discretion to refuse to award fees under [a] contractual provision." *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575, 880 P.2d 1109, 1121 (App. 1994). Contracts providing for payment of attorney fees are to be enforced "'in accordance with the terms of the contract,'" *A. Miner Contracting, Inc. v. Toho-Tolani Cnty. Improvement*

Dist., 233 Ariz. 249, ¶ 40, 311 P.3d 1062, 1074 (App. 2013), *quoting Heritage Heights*, 115 Ariz. at 333, 565 P.2d at 210, and interpreted "to give effect to the intention of the parties as determined from the language of the document in its entirety and the purpose for which the covenants were created," *Powell v. Washburn*, 211 Ariz. 553, ¶ 1, 125 P.3d 373, 374 (2006). The Association's CC&Rs state that

> [i]n the event any . . . person(s) employ/ employs an attorney or attorneys to enforce compliance with or specific performance of the terms of this Declaration, and prevails in such action, the owner or owners against whom the action is brought shall pay all attorneys fees and costs incurred in connection with such action.

The plain language of this provision indicates that if a party prevails in an action seeking enforcement of the community's CC&Rs, that party is entitled to its reasonable attorney fees. *See Emp'rs Mut. Cas. Co. v. DGG & CAR, Inc.*, 218 Ariz. 262, ¶ 24, 183 P.3d 513, 518 (2008) (contract provision, when plain and unambiguous, must be applied as written, and court will not expand it beyond plain and ordinary meaning). The trial court has sole discretion in determining who is the successful party for purposes of awarding attorney fees. *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994); *Schwartz v. Farmers Ins. Co.*, 166 Ariz. 33, 38, 800 P.2d 20, 25 (App. 1990). As noted above, however, the court must award fees in accordance with the terms of the contractual provision in the CC&Rs that allow a prevailing party to recover. *See A. Miner Contracting, Inc.*, 233 Ariz. 249, ¶ 40, 311 P.3d at 1074; *McDowell Mountain Ranch Cmty. Ass'n*, 216 Ariz. 266, ¶ 14, 165 P.3d at 670; *Chase Bank*, 179 Ariz. at 575, 880 P.2d at 1121; *Heritage Heights*, 115 Ariz. at 333, 565 P.2d at 210.

Prevailing Party

¶12 If a reasonable basis supports its determination of a prevailing party, *Murphy Farrell Dev., LLLP*, 229 Ariz. 124, ¶ 31, 272 P.3d at 364, we will defer to the trial court, as it is "better able to evaluate the parties' positions during the litigation and to determine

which has prevailed," *Berry v. 352 E. Va.*, 228 Ariz. 9, ¶ 22, 261 P.3d 784, 788 (App. 2011). The trial court may utilize a number of methods to determine whether a party is "prevailing" for purposes of attorney fees awards. When a case involves multiple claims with varied success, the court may apply either a "percentage of success" or a "totality of the litigation" test to determine the successful party. *Berry*, 228 Ariz. 9, ¶ 22, 261 P.3d at 788-89; *Schwartz*, 166 Ariz. at 38, 800 P.2d at 25; *see also Murphy Farrell Dev., LLLP*, 229 Ariz. 124, ¶ 36, 272 P.3d at 365 (considering attorney fees pursuant to contractual agreement). Partial success does not prevent a party from being awarded attorney fees as the prevailing party. *See Henry v. Cook*, 189 Ariz. 42, 44 n.1, 938 P.2d 91, 93 n.1 (App. 1996); *see also Ocean W. Contractors, Inc. v. Halec Constr. Co.*, 123 Ariz. 470, 473, 600 P.2d 1102, 1105 (1979) (monetary award not dispositive but "an important item to consider when deciding who, in fact, did prevail"). Thus, even if "a party does not recover the full measure of relief it requests[, that] does not mean that it is not the successful party." *See Sanborn*, 178 Ariz. at 430, 874 P.2d at 987. But, when a case involves several claims based upon different facts or legal theories, the court may decline to award fees for "unsuccessful separate and distinct claims." *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 189, 673 P.2d 927, 933 (App. 1983).

¶13 The Association cites *Lake Havasu Resort, Inc. v. Commercial Loan Insurance Corp.*, 139 Ariz. 369, 377, 678 P.2d 950, 958 (App. 1983), to urge that a party cannot be considered "successful" for purposes of awarding attorney fees based upon matters stipulated to before trial. In *Lake Havasu*, the appellant argued it should have been awarded attorney fees as the successful party as to two counts of a six-count complaint that the parties had resolved by agreement before trial. *Id.* The court upheld the trial court's conclusion that a party who resolves an issue without resorting to trial cannot be a prevailing party for purposes of an attorney fee award for those counts. *Id.*

¶14 Without analysis, the *Lake Havasu* court relied on *Waqui v. Tanner Brothers Contracting Co.*, 121 Ariz. 323, 589 P.2d 1355 (1979), which did not address attorney fees pursuant to a mandatory contractual provision; instead, it considered whether the defendant

qualified as "the 'successful party' within the intent of § 12-341." *Waqui*, 121 Ariz. at 327, 589 P.2d at 1359. The *Waqui* court examined the effect of a settlement agreement on the judgment against the defendant, and concluded that under the circumstances present in that case, the plaintiff was the prevailing party on the merits even though the settlement "relieved" the defendant from paying the judgment against him. *Id.*

¶15 Neither *Lake Havasu* nor *Waqui* is dispositive here. Both the Campbells and the Association sought a determination by the trial court of their success on the merits of the case, in accordance with a contractual provision awarding attorney fees to a party successfully enforcing compliance with the CC&Rs. The parties had stipulated—and the trial court had agreed—that the court would determine a prevailing party and award attorney fees accordingly. Neither *Lake Havasu* nor *Waqui* mandate a finding that the parties' stipulation resolving most issues raised in the Campells' complaint precluded either party from being deemed the prevailing party, at least with regard to some of their claims. *See Schweiger*, 138 Ariz. at 189, 673 P.2d at 933 (when party achieves only partial success, fees not awarded for claims on which party did not prevail).

¶16 The record supports a determination that the Campbells prevailed at least in part under either the "totality of the litigation" or "percentage of success" tests because they have achieved most of their goals in bringing the litigation, including those the Association sought to have dismissed.[3] The Campbells sought compliance with the CC&Rs regarding member voting and election rights, sub-association members' right to be nominated and run for a board position,[4] annual meeting procedures, transparency in vote

[3] For example, despite their allegation that the Campbells lacked standing as to members of the Casitas Hermosa sub-association, the Association stipulated that those sub-association members may be nominated for association board positions and run in any election held at the annual meeting.

[4] In its motion to dismiss, the Association claims the Campbells' assertion that Casitas Hermosa homeowners are precluded from being nominated and running for a board position is

tabulation, and "other related obligations." The stipulation—which clarified voting and election procedures, allowed sub-association members to be nominated and run for board positions, permitted votes to be tabulated in full view of any member who requested, and expounded upon the board nomination processes—appears to have addressed all of these issues. Additionally, the court could consider that the Campbells prevailed on their request for a temporary restraining order, and against the Association's motion to disqualify the Campbells' counsel.

¶17 At the same time, there was a basis in the record for the trial court to conclude that the Campbells had obstructed or unreasonably expanded settlement efforts. For example, the Association stated the Campbells had prematurely sought legal relief in the midst of "communications between the board and Mr. Campbell addressing certain issues" and had stalled negotiations in their quest for attorney fees. The Association expressed further concern that the Campbells sought relief only for prospective meetings, which the Association claimed in its motion to dismiss were "not fully ripe for decision." The Association stated it was hesitant to settle issues the court potentially could dismiss for a lack of ripeness, particularly if it would lead to the Campbells seeking attorney fees as the prevailing party.

¶18 In addition, the trial court expressed frustration with both parties for emphasizing the procedural issues rather than settling the substantive issues in an "economical[], efficient[], and quick[]" manner. Those circumstances might reasonably have affected the court's decision to decline to designate a prevailing party. Because we cannot determine if the court's ruling was based upon an erroneous assumption that a stipulation precluded the

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"incorrect." However, a resolution apparently passed by the Association's board of directors in 2007 specifically stated "the right to run or be elected to the [Association's] Board of Directors is not part of" Casitas Hermosa homeowners' rights, and "[n]o member of a Sub Association is permitted to serve on or be part of the Board of Directors of [Florence Gardens Mobile Home Association]." Neither party cited to the record or provided support for their assertions.

finding of a prevailing party—as argued by the Association—we vacate the order denying attorney fees. On remand, the court shall determine whether there is a prevailing party based upon a "percentage of success" or a "totality of the litigation" test and, if so, award fees accordingly.

Attorney Fees on Appeal

¶19 Both parties have requested their attorney fees and costs on appeal, pursuant to the CC&Rs, Rule 21(c), Ariz. R. Civ. App. P., and § 12-341.01. But because neither party prevailed on appeal, we make no award at this time. Following its final determination of attorney fees on remand, the trial court is authorized to consider an award for fees incurred during this appeal. *See Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, ¶ 37, 165 P.3d 173, 182 (App. 2007) (deferring party's request for attorney fees on appeal "to the trial court's discretion pending resolution of the matter on the merits").

Disposition

¶20 For the foregoing reasons, we vacate the court's order finding neither party had prevailed and remand for further proceedings consistent with this decision.